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Sup. Ct

IN THE

Supreme Court of the United States

October Term, 1946
No. 983

SAMUEL ALLEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

LAWRENCE KOVALSKY,
DAVID GOLDSTEIN,
Counsel for Petitioner.

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IN THE

Supreme Court of the United States

October Term, 1946

No.

SAMUEL ALLEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT TO REVIEW JUDGMENT ENTERED JANUARY 10, 1947

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States.

The petition of SAMUEL ALLEN respectfully shows:

A.

Summary Statement of the Matter Involved

An information was filed on July 2, 1945, in the United States District Court, Southern District of New York, accusing the petitioner of unlawful possession of counterfeit red ration food stamps, in wilful violation of General Ration

Order No. 8 issued by the Price Administrator, and Title 50, Appendix, Section 633, United States Code (R. 2-3). The information expressly disclaims that petitioner knew that such ration stamps were counterfeit (R. 2).

General Ration Order No. 8 provides, in part, as follows:

> "Sec. 2.5. Acquisition, use, transfer or possession of counterfeited or forged ration document. (a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.
>
> "Sec. 2.6. Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, transfer, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order.
>
> * * *
>
> "Sec. 3.1. Criminal prosecution. Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any ration order, shall be fined not more than $10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties as may be prescribed by law."

Title 50, Appendix, Section 633, subdivision 5, United States Code, is to the same effect as Section 3.1 of General Ration Order No. 8.

Petitioner pleaded not guilty and a trial was had on January 4, 1946, before District Judge Henry W. Goddard and a jury.

At the trial, petitioner rested on the Government's case and moved to dismiss because of the insufficiency of evidence, both at the close of the Government's case (R. 35-44) and the entire case (R. 45), which motions were denied (R. 44, 45).

The jury found petitioner guilty and petitioner moved to set aside the jury's verdict, which motion was denied (R. 52, 53). Exceptions were duly taken to the denial of these motions (R. 44, 45, 53). Petitioner was sentenced to imprisonment for one year and fined $2,500.00, to stand committed until payment of such fine (R. 3, 55).

At the trial, the Government's witnesses testified that the petitioner and his wife occupied a hotel room (R. 8, 12-13). That on June 29, 1945, two New York City detectives entered this hotel room while petitioner was there, made a search and found, in the clothes closet, a brief case with the initials, "S.A." thereon (R. 18). This brief case contained packages which the detectives opened and were found to contain red ration stamps (R. 19). The petitioner informed the detectives that these packages were left with him by a friend, a Mr. Frank (R. 22, 23); he did not claim to own these packages or to know what they contained (R. 23, 31).

At the trial, the Assistant United States Attorney conceded that there were 50 or 100 different ways in which a man could be possessed legally of the red ration food stamps in question pursuant to the Ration Order, stating:

> "Mr. Burchill: If your Honor please, there are perhaps 50 or 100 different ways in which a man could

be possessed legally of these stamps, according to the ration order." (R. 43)

The Ration Order in question was not marked in evidence at the trial and the Trial Court, in its charge to the jury did not inform the jury as to its contents. The Trial Court's charge to the jury merely stated:

> "And the question you have to decide is whether this defendant did illegally possess these stamps." (R. 48)
>
> * * *
>
> "* * * you do have to decide whether he had illegal possession of these stamps, * * * you may draw your own conclusion as to whether or not he got them legally." (R. 49)

B.

Opinions Below

The District Court did not file any opinion. On appeal to the United States Circuit Court of Appeals for the Second Circuit, the Court, after argument of such appeal, filed on October 31, 1946, two opinions which have not yet been officially reported but which are included in the record filed herewith (R. 65-70). The majority opinion by Judge Frank and concurred in by Judge Learned Hand held that the judgment of conviction should be reversed because the evidence was insufficient, stating, in part (R. 69):

> "Without doubt, there was sufficient evidence (1) that defendant knowingly had possession of the package and (2) that the package contained the stamps. But more was essential: the defendant could not be

> convicted absent evidence that he knew the contents of the package. In that respect the evidence was insufficient."

A dissenting opinion was filed at the same time by Judge Swan (R. 70) which held that on the evidence in this case, the jury could render a verdict of guilt because it did not affirmatively appear from the evidence that at the time that the packages in question were opened, the petitioner expressed surprise at their contents and did not affirmatively protest his innocence.

After the filing of these two opinions, the Circuit Court of Appeals, on its own motion, ordered a re-hearing of petitioner's appeal (R. 72). After re-hearing, two additional opinions were filed on the 10th day of January, 1947, which have not yet been officially reported but are included in the record filed herewith (R. 72-74).

After such re-hearing, the Circuit Court of Appeals reversed itself and held that the judgment of conviction herein should be affirmed. Judge Frank, who had previously written the majority opinion for reversal, filed an opinion for affirmance, stating, in part (R. 72-73):

> "Had the defendant remained silent when questioned by the detectives, there would have been nothing for the jury on the issue of his knowledge of the contents of the package. But the detectives testified that defendant gave an explanation of a kind which the jury may have reasonably believed to be so fishy as to show, by the mere telling of it, a guilty knowledge of what was inside the paper parcel found in defendant's brief-case.
>
> * * *

> Defendant's story may have been true; for it is not inconceivable that a man might accept custody of a package, contents unknown, from a casual acquaintance."

Judge Learned Hand, on the re-hearing, wrote a dissenting opinion (R. 73-74), holding that the evidence was insufficient and that the petitioner's explanation to the detectives did not appear "to be a sham on its face" so as to authorize a jury "to infer guilt from the concoction of an evasion."

C.

Jurisdictional Statement

This Court has jurisdiction to entertain this petition for a writ of certiorari, pursuant to 28 U. S. C. A. §347(a) [Judicial Code §240(a)] and Rule 37(b) of the Federal Rules of Criminal Procedure.

The judgment of affirmance of the Circuit Court of Appeals was entered on January 10, 1947 (R. 75).

D.

Questions Presented

1. Whether the evidence adduced was sufficient in law to authorize a jury to find the elements of the crime charged?

2. Whether the District Court committed error in denying petitioner's motion to dismiss at the close of the Government's case and the entire case, and petitioner's motion to set aside the jury's verdict on the ground of insufficiency of the evidence?

3. Whether the disbelief by the jury of petitioner's explanation to the arresting police officers that the packages in question were left with him by a friend, a Mr. Frank, is *per se* sufficient in law to support a finding by the jury that the petitioner knowingly had the ration stamps in question in his possession when the jury learned of such explanation through the testimony of Government witnesses, and not through the testimony of the petitioner who did not testify, and no affirmative evidence was adduced showing that such explanation was false?

4. Whether in a criminal trial before a jury predicated upon an alleged wilful violation of an administrative order, which prohibits possession of ration stamps, except in accord with its provisions, and provides from "50 to 100 different ways in which a man can be possessed legally of these stamps", it is necessary that the jury be informed of the various legal methods by which possession of such stamps can be acquired, i. e., by marking such administrative order in evidence or by the Trial Court, in its charge, informing the Jury of its contents, neither of which methods were followed in this case?

5. Whether the charge of the Trial Court adequately instructed the jury on the basic issues of what constituted the crime charged?

E.

Reasons Why a Writ of Certiorari Should Be Granted

1. The question of the sufficiency and competency of evidence to establish a possession on which criminal liability can be predicated is important to the administration

of Federal criminal justice as there are numerous Federal crimes in which possession is an important element.

2. The question of the proper procedure to follow in criminal prosecutions predicated on administrative orders is important to the administration of Federal criminal justice.

3. This case was submitted to the jury in a way that raises an important question in the administration of Federal criminal justice.

WHEREFORE, the petitioner prays that this Court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Second Circuit, to review the judgment entered in this case on January 10, 1947 and that such judgment be reversed.

Dated: New York, New York, January 31st, 1947.

Respectfully submitted,

SAMUEL ALLEN,
Petitioner,

By: LAWRENCE KOVALSKY,
DAVID GOLDSTEIN,
Counsel for Petitioner.

IN THE

Supreme Court of the United States

October Term, 1946

No.

SAMUEL ALLEN,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Opinions Below

The District Court did not file any opinion. The Circuit Court of Appeals filed four opinions which have not yet been officially reported but are incorporated in the record on appeal (R. 65-74). After the original argument of the appeal in the Circuit Court, Judge Frank on October 31st, 1946 filed an opinion for reversal which was concurred in by Judge Learned Hand (R. 65-70). Judge Swan filed a dissenting opinion (R. 70). After rehearing ordered on the Circuit Court's own motion, Judge Frank on January 10, 1947 filed an opinion for affirmance (R. 72-73) and Judge Learned Hand filed a dissenting opinion for reversal (R. 73-74).

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. A. 347(a) [Judicial Code §240(a)] and Rule 37(b) of the Federal Rules of Criminal Procedure.

The judgment of affirmance of the Circuit Court of Appeals was entered on January 10, 1947 (R. 75).

Statement of the Case

An information was filed on July 2, 1945 in the United States District Court, Southern District of New York accusing the petitioner of unlawful possession of counterfeit red ration food stamps, in wilful violation of General Ration Order No. 8 issued by the Price Administrator, and Title 50, Appendix, Section 633, United States Code (R. 2-3). The information expressly disclaims that petitioner knew that such ration stamps were counterfeit (R. 2).

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>
> "Sec. 2.6. Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, transfer, possess or control a ration document except the person or the agent of the person to whom such ration document was issued

or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order.

* * *

"Sec. 3.1. Criminal prosecution. Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required, by any ration order, shall be fined not more than $10,000 or imprisoned for not more than one year, or both, and shall be subject to such other penalties as may be prescribed by law."

Title 50, Appendix, Section 633, subdivision 5, United States Code, is to the same effect as Section 3.1 of General Ration Order No. 8.

Petitioner pleaded not guilty and a trial was had on January 4, 1946 before District Judge Henry W. Goddard and a jury.

At the trial, petitioner rested on the Government's case and moved to dismiss because of the insufficiency of evidence both at the close of the Government's case (R. 35-44) and the entire case (R. 45) which motions were denied (R. 44, 45).

The jury found petitioner guilty and petitioner moved to set aside the jury's verdict, which motion was denied (R. 52, 53).

Exceptions were duly taken to the denial of these motions (R. 44, 45, 53). Petitioner was sentenced to imprisonment for one year and fined $2500 to stand committed until payment of such fine (R. 3, 55).

At the trial, the Government's witnesses testified that petitioner and his wife occupied a hotel room (R. 8, 12-13). That on June 29, 1945 two New York City detectives, Eu-

gene Epstein and John F. Dalton entered this hotel room while petitioner was there, made a search and found in the clothes closet a briefcase with initials "S.A." thereon (R. 18). This briefcase contained packages which the detectives opened and were found to contain red ration stamps (R. 19).

The petitioner informed the detectives that these packages were left with him by a friend, a Mr. Frank (R. 22, 23); he did not claim to own these packages or to know what they contained (R. 23, 31).

Detective Epstein testified (R. 23):

> "Q. But there is no question about the fact that at no time during the conversation that you had with him relative to these stamps did he claim to own them, is that right? A. That is true.
>
> * * *
>
> Q. In any event, he never claimed to own these things and never claimed to know what was in that package, is that right? A. That is correct."

Detective Dalton testified (R. 31):

> "Q. Did he say anything which would indicate that he knew what was in that package before Epstein opened it? Yes or no. A. He did not, no."

At the trial, the Assistant United States Attorney conceded that there were fifty or one hundred different ways in which a man could be possessed legally of the red ration food stamps in question pursuant to the ration order under which the petition was prosecuted, stating (R. 43):

> "Mr. Burchill: If your Honor please, there are perhaps fifty or one hundred different ways in which

a man could be possessed legally of these stamps, according to the ration order."

The ration order in question was not offered in evidence at the trial and the Trial Court in its charge to the jury did not inform the jury as to its provisions. The Trial Court's charge to the jury did not define what constituted a legal or illegal possession of the ration stamps in question but merely stated:

> "And the question you have to decide is whether this defendant did illegally possess these stamps." (R.48)
>
> * * *
>
> "* * * you do have to decide whether he had illegal possession of these stamps, * * * you may draw your own conclusion as to whether or not he got them legally." (R. 49)

Specification of Errors

(1) The Government failed to adduce evidence sufficient in law to establish beyond a reasonable doubt that the defendant unlawfully possessed the red food ration stamps referred to in the information, and it was error to submit this case to the jury.

(2) The Trial Court failed to instruct the jury on the elements of the crime charged and authorized the jury to render a verdict of guilty on their own conception of what constituted an unlawful possession of the red ration food stamps in question.

Summary of Argument

(1) Before criminal liability predicated on an alleged unlawful possession can be imposed, the Government must establish a voluntary conscious possession by competent legal evidence which the Government failed to do in this case.

(2) In a criminal jury trial involving the issue of legality of possession, the Trial Court in its charge should define to the jury what constitutes an illegal possession or the jury should have before it some standard by which to determine the legality of such possession.

In the case at Bar, the Trial Court did not define in its charge what constituted an illegal possession and the jury did not have any standard before it by which to determine whether the petitioner's alleged possession was illegal.

ARGUMENT

I.

The Government failed to adduce evidence sufficient in law to establish beyond a reasonable doubt that the defendant unlawfully possessed the ration stamps referred to in the information.

This Court has jurisdiction to determine the issue of whether there is any evidence to sustain a judgment of conviction.

Wiborg v. *U. S.*, 163 U. S. 632, 658;
Clyatt v. *U. S.*, 197 U. S. 207, 222;
Williamson v. *U. S.*, 207 U. S. 425, 452-453.

In *Clyatt* v. *U. S.*, *supra*, this Court stated (p. 222):

> "it is the imperative duty of a court to see that all the elements of his crime are proved, or at least that testimony is offered which justifies a jury in finding those elements."

In *Williamson* v. *U. S.*, *supra*, this Court stated (p. 452):

> "it has been settled that in a criminal case where it plainly appeared that there was no evidence whatever justifying conviction, this court would so hold. * * *".

In the case at Bar, it was necessary for the Government to establish that petitioner knowingly possessed the ration stamps in question. Section 3.1 of General Ration Order No. 8 only makes criminal a violation thereof which is wilful.

In *Baender* v. *Barnett*, 255 U. S. 224-225, this Court stated:

> "The petitioner was indicted under §169 of the Criminal Code, which declares that 'whoever, without lawful authority, shall have in his possession' any die in the likeness or similtude of a die designated for making genuine coin of the United States shall be punished, etc.
>
> * * *
>
> "The statute is not intended to include and make criminal a possession which is not conscious and willing."

The Information in the case at Bar recognizes this burden of proof and charges that:

> "the defendant herein, unlawfully, wilfully and knowingly did have in his possession and control ap-

> proximately 106,128 documents purporting to be red ration documents and stamps, * * *." (R. 2)

The evidence in this case merely shows that the petitioner had in his possession a sealed package. There is no proof that he knew the contents thereof and no inference can be drawn from his possession of the sealed package that he knew the contents thereof in view of the presumption of innocence, the effect of which this Court in *Kirby* v. *U. S.*, 174 U. S. 47 has stated to be (p. 55):

> "The presumption of the innocence of an accused attends him throughout the trial and has relation to every fact that must be established in order to prove his guilt beyond reasonable doubt. 'This presumption', this court has said, 'is an instrument of proof created by the law in favor of one accused, whereby his innocence is established until sufficient evidence is introduced to overcome the proof which the law has created.' Coffin v. United States, 156 U. S. 432, 459."

After the original argument of this appeal in the Circuit Court of Appeals, a majority of that Court in an opinion by Judge Frank held that the evidence was insufficient, stating (R. 69):

> "Without doubt, there was sufficient evidence (1) that defendant knowingly had possession of the package and (2) that the package contained the stamps. But more was essential: the defendant could not be convicted absent evidence that he knew the contents of the package. In that respect the evidence was insufficient."

After re-argument of this appeal, the majority opinion of the Circuit Court of Appeals stated (R. 72-73):

> "Had the defendant remained silent when questioned by the detectives, there would be nothing for the jury on the issue of his knowledge of the contents of the package. But the detectives testified that defendant gave an explanation of the kind which the jury might reasonably have believed to be so fishy as to show, by the mere telling of it, a guilty knowledge of what was inside the paper parcel found in defendant's brief case.
>
> * * *
>
> Defendant's story may have been true; for it is not inconceivable that a man might accept custody of a package, contents unknown, from a casual acquaintance."

The question is therefore raised as to the effect of the disbelief by the jury of petitioner's explanation at the time of his arrest to the police officers as to how he obtained possession of the sealed package, to wit, that same was left with him by a friend, a Mr. Frank, when such explanation was conveyed to the jury by Government witnesses, the defendant not having testified.

While it is true that a false and deceptive explanation by the accused is competent as evidence in a criminal case, such evidence "scarcely comes up to the standard of evidence tending to establish guilt."

> *Hickory* v. *U. S.*, 160 U. S. 408, 417;
> *Alberty* v. *U. S.*, 162 U. S. 499, 510.

The rule making false and deceptive explanations by an accused admissible as evidence inherently has as a condi-

tion precedent to its application the fact that the explanation was shown to be false and deceptive.

In 16 Corpus Juris 550, §1059, this rule is stated as follows:

> "The fact of the utterance of falsehoods by an accused to exculpate himself, *the falsehoods being satisfactorily proved,* is relevant to show a consciousness of guilt." (Italics ours)

To same effect:

> 22 C. J. S. 973, §636.

In the case at Bar, no evidence was adduced showing that the petitioner's explanation was false. This explanation on its face was not obviously false. This is conceded in the majority opinion of the Circuit Court of Appeals filed after re-hearing where it is stated (R. 73):

> "Defendant's story may have been true; for it is not inconceivable that man might accept custody of a package, contents unknown, from a casual acquaintance."

Disbelief by the jury of such explanation when petitioner did not testify, did not make such explanation false but merely destroyed its value as affirmative evidence.

If the judgment of conviction herein is allowed to stand for the reasons advanced by the Circuit Court of Appeals, it would mean that every parcel checking service would do business at the peril of criminal liability because if contraband were found in the checked parcels and a jury chose to disregard the explanation that such parcel was checked, then under the reasoning of the Circuit Court of Appeals a verdict of guilty would follow.

II.

The Trial Court failed to instruct the jury on the elements of the crime charged and authorized the jury to render a verdict of guilty on their own conception of what constituted an unlawful possession of the red food ration stamps in question.

In a criminal case, the Trial Court in its charge should inform the jury of the nature of the crime of which the defendant stands accused and the elements thereof.

In *Kreiner* v. *United States*, 11 F. (2d) 722, cert. denied 271 U. S. 688 the Court stated this rule, as follows (p. 731):

> "In a criminal case a court should instruct on all essential questions of law involved in the case, whether requested or not. People v. Odell, 130 N. E. 619, 230 N. Y. 481; Commonwealth v. Ferko, 112 A. 38, 269 Pa. 39; Pearson v. State, 226 S. W. 538, 143 Tenn. 385; Duroff v. Commonwealth, 232 S. W. 47, 192 Ky. 31; State v. Lackey, 132 S. W. 602, 230 Mo. 707."

In *Williams* v. *United States*, 131 F. (2d) 21, the Court of Appeals for the District of Columbia, in an opinion by Mr. Justice Vinson reversed a judgment of conviction because of the failure of the Trial Court to instruct the jury on the elements of the crime charged, stating (pp. 22-23):

> "(3) A basic defect of the charge is the failure to discuss and define the offenses included within the indictment.
>
> * * *
>
> The average man has some idea of what murder is, but we would not expect a judge to say, Jurors, you

> know what murder is, go and decide if this man is guilty of it.
>
> * * *
>
> It is almost, if not, as important to a defendant to have a jury instructed on the law applicable to his particular case by the judge, who knows the law, as to have a jury of his peers. The latter is supposed to safeguard our institution of fair trial by insuring impartiality. But of what value is an open mind, if it does not know, with clear delineation, the issues upon which it is to pass judgment? Just as a lawyer might be ignorant in a meeting of scientists, so may a juror be in his casual acquaintance with the law. The jury, a group of responsible citizens, is entitled to this legal instruction if it must accept the duty of passing upon the very life and death of a man. The law requires it."

In *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, this Court held that it was the duty of the Trial Court to instruct the jury as to the law applicable in the case, stating (p. 95):

> "In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. This discharge of the judicial function as at common law is an essential factor in the process for which the Federal Constitution provides. As was said by Mr. Justice Story, in United States v. Battiste, 2 Sumner, 240, 243: 'It is the duty of the Court to instruct the jury 'as to the law; and it is the duty of the jury to follow the law, as it is laid down by the Court.' "

While *Herron* v. *Southern Pacific Co., supra,* was a civil case, the rules of law quoted above therefrom were ap-

proved and applied by this Court in *Bollenbach* v. *United States*, 326 U. S. 607, 612, which was a criminal case.

In the case at Bar, it was necessary for the jury to find that the defendant wilfully and knowingly possessed the red food ration stamps in question and that such possession was unlawful before a verdict of guilty could be rendered. Nowhere in the charge to the jury did the Trial Court instruct the jury as to what constituted an illegal possession. In opening his charge to the jury, the Trial Court informed the jury as follows:

> "The Court: Madam Foreman, Members of the jury: This defendant is charged with a violation of the regulations relating to the OPA on price regullations. These regulations have the force of law." (R. 47)

This is the only reference in the entire charge to the statute and the regulations which the defendant was accused of violating. Nowhere in the charge was the jury informed as to what constituted a violation of these regulations or the provisions thereof. The Court further charged the jury:

> "Now, this defendant is charged with a violation of these regulations in that he had in his possession upwards of one million red food ration stamps. The Government says that whether these stamps were genuine or whether they were counterfeit, he has no right to them and his possession of them is illegal. And the question you have to decide is whether this defendant did illegally possess these stamps.
>
> You are not called upon to decide whether they were counterfeit or real because, as I say, the charge is

that, no matter whether they were good or bad, he had no right to them, that his possession of them was illegal. (R. 48)

* * *

Now, there has been a reference to the fact that these stamps were counterfeit. It seems to me that while that has no bearing, no direct bearing, on the question you have to decide, whether the defendant was in possession of counterfeit stamps—you don't have to decide whether he was in possession of counterfeit stamps at all, but you do have to decide whether he had illegal possession of these stamps, whether they were good or bad, and so *you may draw your own conclusion as to whether or not he got them legally.* You will consider whether he could obtain from a legitimate source, the United States Government, counterfeit stamps. If he could not get them from the United States Government because they were counterfeit, you can consider whether that indicates to you that he got them from some illegal source. (R. 49)

* * *

Now, mere possession of counterfeit ration stamps is not sufficient to establish the guilt of this defendant. You must find that he had possession of these stamps, good or bad, illegally, and that is what you have got to decide. That is quite a simple issue." (R. 49-50)

It is to be noted by the foregoing portions of the charge of the Trial Court, that the jury was not informed as to what constituted a legal or an illegal possession of the red ration food stamps in question. The only reference in such charge to a legitimate source from which the defendant could acquire the red ration food stamps in question was the United States Government. The Assistant United

States Attorney who prosecuted this action conceded that there were 50 or 100 different ways in which one could be possessed legally of red ration food stamps stating:

> "Mr. Burchill: If your Honor please, there are, perhaps, 50 or 100 different ways in which a man could be possessed legally of these stamps, according to the Ration Order." (R. 43)

Both Section 2.6 of the General Ration Order No. 8, the Regulation which the defendant is charged with violating, and the Information specifically recognize that it is possible for a person to legally acquire red ration food stamps from a source other than the United States Government. Such section reads as follows:

> "Sec. 2.6. Acquisition, use, transfer or possession of ration document. No person shall acquire, use, permit the use of, transfer, possess or control a ration document except the person or the agent of the person to whom such ration document was issued or by whom it was acquired in accordance with a ration order or except as otherwise provided by a ration order."

In conformity with such Section 2.6 the Information in the case at bar charges that the defendant was

> "not the person or the agent of the person to whom said ration documents, if genuine, were issued or would have been issued or by whom they were acquired, or would have been acquired, in accordance with Revised Ration Order No. 16 and General Ration Order No. 8 duly issued by the Price Administrator * * *." (R. 2)

It is thus seen that the Trial Court in its charge to the jury did not inform the jury as to the elements of the crime charged. The charge as far as it went was erroneous because it indicated to the jury that the only possible legitimate source that the defendant could acquire the red ration food stamps in question was the United States Government which is not in accord with the provisions of Section 2.6 and the concession made by the Assistant United States Attorney at the trial.

In *United States* v. *Harris*, 45 F. 2d, 690, the Court stated (p. 691):

> "Where the evidence is meager, the Court should be astute to see that the charge advised the jury of all the essential elements of the crime."

It is thus seen that in the case at Bar, the Trial Court failed to instruct the jury as to what constituted an illegal possession of the ration stamps in question.

In *Bollenbach* v. *United States*, 326 U. S. 607, this Court reversed a judgment of conviction because of an equivocal direction in the Court's charge, stating (p. 613):

> "A conviction ought not to rest on an equivocal direction to the jury on a basic issue."

The charge in the case at Bar did not give to the jury any direction on the basic issue as to what constituted an illegal possession of the ration stamps in question.

In *Bollenbach* v. *United States, supra,* certiorari was granted by this Court because such case (p. 608)

> "was submitted to the jury in a way that raised an important question in the administration of federal criminal justice."

In *Bihn* v. *United States*, decided June 10, 1946 by this Court U. S. , 66 S. Ct. 1172, this Court, in a criminal action charging violation of the statute and regulations governing the rationing of gasoline granted certiorari (p. 1173)

> "because the charge given raised an important question in the administration of the federal criminal laws."

Petitioner submits that the charge in this case also raises an important question in administration of Federal Criminal Laws.

CONCLUSION

Certiorari should be granted herein and the judgment of conviction reversed.

Respectfully submitted,

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FILED
MAR 10 1947
CHARLES ELMORE CROPLEY
CLERK

No. 983

In the Supreme Court of the United States

OCTOBER TERM, 1946

SAMUEL ALLEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence is sufficient to support petitioner's conviction of wilfully and unlawfully possessing ration stamps.

2. Whether the trial judge's charge resulted in reversible error.

STATUTE AND REGULATIONS INVOLVED

The Act of June 28, 1940, c. 440, 54 Stat. 676, as amended by the Act of May 31, 1941, c. 157, 55 Stat. 236, and by Title III of the Second War Powers Act of March 27, 1942, c. 199, 56 Stat. 177, 50 U. S. C. App., Supp. V, 633 (50 U. S. C. App., Supp. V, 1152), provides in pertinent part:

> SEC. 2 (a) (2). * * * Whenever the President is satisfied that the fulfillment of requirements for the defense of the United States will result in a shortage in the supply of any material or of any facilities for defense or for private account or for export, the President may allocate such material or facilities in such manner, upon such conditions and to such extent as he shall deem necessary or appropriate in the public interest and to promote the national defense.
>
> * * * * *
>
> SEC. 2 (a) (5). Any person who wilfully performs any act prohibited, or wilfully fails to perform any act required by, any provision of this subsection (a) or any rule, regulation, or order thereunder, whether

heretofore or hereafter issued, shall be guilty of a misdemeanor, and shall, upon conviction, be fined not more than $10,000 or imprisoned for not more than one year, or both.

* * * * *

SEC. 2 (a) (8). The President may exercise any power, authority, or discretion conferred on him by this subsection (a), through such department, agency, or officer of the Government as he may direct and in conformity with any rules or regulations which he may prescribe.

Sections 2.5 and 2.6 of General Ration Order No. 8, as amended (8 F. R. 3783; 8 F. R. 9626; 9 F. R. 1325; 9 F. R. 2746), provide:

SECTION 2.5 *Acquisition, use, transfer or possession of counterfeited or forged ration document.* (a) No person shall acquire, use, permit the use of, transfer, possess or control any counterfeited or forged ration document under circumstances which would be in violation of section 2.6 if the document were genuine or if he knows or has reason to believe that it is counterfeited or forged.

SECTION 2.6 *Acquisition, use, transfer or possession of ration document.* No person shall acquire, use, permit the use of, possess or control a ration document except the person, or the agent of the person, to whom such ration document was issued, or by whom it was acquired in accordance

with a ration order or except as otherwise provided by a ration order. No person shall use or transfer a token or other ration document except in a way and for a purpose permitted by a ration order.

STATEMENT

An information in one count was filed against petitioner in the District Court for the Southern District of New York, charging him with a violation of Section 2 (a) of the Act of June 28, 1940, as amended (*supra*). The information alleged that on June 29, 1945, petitioner wilfully and knowingly had in his possession and control 106,128 counterfeit red ration stamps, purporting to represent 1,061,280 ration points, under circumstances which would have been in violation of Section 2.6 of General Ration Order No. 8 if the stamps had been genuine, "that is to say, the * * * defendant did not know the * * * ration documents to be counterfeit, and was * * * not the person or the agent of the person to whom said ration documents, if genuine, were issued or would have been issued or by whom they were acquired or would have been acquired, in accordance with Revised Ration Order No. 16 and General Ration Order No. 8 duly issued by the Price Administrator." (R. 2–3.) After a jury trial, petitioner was found guilty (R. 52), and he was sentenced to imprisonment for one year and to pay a fine

of $2,500 (R. 55).[1] Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgment was first reversed on October 31, 1946, in a majority opinion written by Judge Frank in which Judge Learned Hand joined (R. 65–70); Judge Swan dissented (R. 70). Thereafter, the court on its own motion directed reargument (R. 72), and on January 10, 1947, affirmed the judgment in a majority opinion by Judge Frank in which Judge Swan joined (R. 72–73); Judge Learned Hand dissented (R. 73–74).

The evidence adduced at petitioner's trial may be summarized as follows:

On June 29, 1945, two New York City detectives, Eugene Epstein and John F. Dalton, went to petitioner's room in the Hotel Duane in New York City, occupied by himself and his wife. Epstein identified himself to petitioner and informed him that he and Dalton had come to investigate a matter "which concerned the State of New York."[2] The officers entered the room, and Epstein searched it. (R. 13, 18, 28.) He found in a closet a brief case bearing petitioner's initials. He opened the brief case and found in it a number of packages wrapped in paper. The

[1] On January 8, 1946, petitioner elected to begin service of his sentence (R. 61). The Bureau of Prisons advises that petitioner was admitted to bail on January 26, 1946, pending determination of his appeal.

[2] Epstein testified that the occasion of their visit had no connection with ration stamps (see R. 19, 22, 25).

packages were not sealed, but were tie[d with] string. In one of these packages, Epste[in dis]covered a quantity of red ration stamps. [(R. 18–]19, 23, 28–29, 31.)[1] Epstein testified t[hat he] asked petitioner "where he got these st[amps" and petitioner replied that "they were lef[t there] by a Mr. Frank"; that petitioner said he [did not] know "where Mr. Frank was or where h[e could] be located"; and that petitioner "never [claimed] to own these things, and never claimed t[o know] what was in that package" (R. 22–23). [Dalton] testified that Epstein "asked [petitioner] [where] he had gotten the stamps, and [petitione[r] said] he got them from a man by the name [of Mr.] Frank. * * * he did not know h[is last] name"; that petitioner was not asked whe[ther the] "articles contained in that brown pack[age be]longed to him," but was asked, "Where [did you] get these stamps?"; that petitioner did [not say] that Frank "left that package with him," [but said,]

[1] The stamps in the package were thus describ[ed in the] brief of the United States Attorney filed in the ci[rcuit court] of appeals (p. 3): The stamps were in sheets, [similar to] large sheets of perforated postage stamps. The s[heets were] 8½ by 11 inches and each contained 144 counter[feit ration] stamps (Govt. Ex. 3, R. 20, 25). There were 737 s[uch sheets] in the brief case, making a total of 106,128 stamps. If the stamps had been genuine they would have appear[ed in War] Ration Book No. 4 (Govt. Ex. 4, R. 33) in a differ[ent layout] (R. 33). It was stipulated that the original exh[ibits "may] be submitted to the Circuit Court of Appeals on the argument of this case and referred to in the briefs of either parties with the same force and effect as if same had been set forth at length in the record on appeal * * *" (R. 62).

"he got them"; that Epstein "tore the paper and there were the stamps. * * * And then he asked [petitioner] 'Where did you get these stamps?' and he said 'I got them from a man by the name of Mr. Frank' " (R. 29–31). Dalton also testified that petitioner did not claim ownership of the stamps and did not "say anything which would indicate that he knew what was in that package before or after * * * Epstein opened it" (R. 31).

An O. P. A. "counterfeit specialist" testified that the ration stamps which the officers found in the package were counterfeit (R. 32–34).

Petitioner's motion for a directed verdict of acquittal at the close of the Government's case was denied (R. 35–44); he did not take the stand and offered no evidence in his own behalf (see R. 45).

ARGUMENT

I

Petitioner contends (Pet. 6–7, 14–18) that there was not sufficient evidence to support submission to the jury of the issue whether he knowingly possessed the ration stamps. This Court has said it will not grant certiorari to review evidence. *United States* v. *Johnston,* 268 U. S. 220, 227; see also *General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178. There is nothing in this case, we submit, to warrant a departure from this practice.

As we see the case, the evidential picture was simply this: A package of not inconsiderable size, containing 106,128 counterfeit red ration stamps, representing 1,061,280 ration points, was found in petitioner's personal brief case in a closet in a hotel room occupied by petitioner and his wife, by New York City detectives investigating a state matter. The package in which these counterfeit stamps were concealed was not sealed but was in a paper parcel tied with string. If petitioner had remained silent when confronted with this mass of contraband documents, there can be no doubt that the jury would have been entitled to infer that he knew what was in the package.[4] It may be open to question whether, in the face of such convincing, though circumstantial, evidence of guilty knowledge, a defendant, by explanation of his possession, may ever bar appraisal by the jury of the explanation.[5] But certainly, to have that effect, the explanation must be at least a persuasive one when gauged by the circumstances which must be overcome. As testified to by the officers, petitioner's explanation, in the light most favorable to him, was simply this: the package containing the enormous quantity of

[4] Compare the inference of knowledge of theft arising from the possession of recent stolen goods. *Janow* v. *United States*, 141 F. 2d 1017 (C. C. A. 5); *Husten* v. *United States*, 95 F. 2d 168, 170 (C. C. A. 8); *Levi* v. *United States*, 71 F. 2d 353, 354 (C. C. A. 5); *Rosen* v. *United States*, 271 Fed. 651, 655.

[5] Compare *Levi* v. *United States*, *supra*; *Rosen* v. *United States*, *supra*.

counterfeit ration stamps found in his brief case was left with him or he got it from a man named "Frank," but he was not aware of the contents of the package. However, he professed not even to know the man's last name or his whereabouts. Indeed, the disclosure of the stamps did not, as Judge Swan points out (R. 70), cause him surprise so far as appears from the officers' testimony. It would seem evident, as Judge Frank puts it (R. 72), that the explanation given to the officers was "of a kind which the jury may reasonably have believed to be so fishy as to show, by the mere telling of it, a guilty knowledge of what was inside the paper parcel found in defendant's brief case."

Apropos the considerations referred to in Judge Hand's dissenting opinion (R. 73–74), we think it need only be said that the substantiality of the Government's case did not depend here upon any inference arising from petitioner's failure to take the stand; it was substantial before. And just because it is not entirely inconceivable that petitioner's story may have been true, that is no reason for depriving the jury of its appropriate function of determining whether it was true. The duty of the trial, as well as of the appellate court, was, at most, simply to ascertain whether it would be unreasonable, under the circumstances, for the jury to conclude that petitioner's disclaimer of knowledge of the package's contents was unbelievable. Those courts, we believe, could not have properly so ruled.

2. Petitioner also contends (Pet. 7, 19–25) that the trial judge committed reversible error in failing to instruct the jury as to the circumstances under which possession of ration stamps was illegal. Petitioner made no complaint on this score at the trial (see R. 50–52), and his objection, raised for the first time on appeal, clearly presents no ground for reversal. *Johnson* v. *United States*, 318 U. S. 189, 201; *Holmgren* v. *United States*, 217 U. S. 509, 523–524; *Allis* v. *United States*, 155 U. S. 117, 122; *United States* v. *Manton*, 107 F. 2d 834, 846 (C. C. A. 2), certiorari denied, 309 U. S. 664. But, in any event, as the majority below stated, there was "nothing improper in the judge's charge" (R. 73). Petitioner's argument is that since the prosecutor "conceded" at the trial that "there are perhaps fifty or a hundred different ways in which a man could be possessed legally of these stamps, according to the ration order" (R. 43), it was incumbent upon the judge to instruct the jury as to the precise circumstances under which one could legally possess such stamps; and that the judge instead of doing so merely told the jury that they might "draw [their] own conclusion as to whether or not he [petitioner] got them legally" (R. 49). The judge, however, told the jury that while the genuineness of the stamps was not directly involved in the case, they could consider "whether he could obtain from a legitimate source, the United States Government, counterfeit stamps.

If he could not get them from the United States Government because they were counterfeit, you can consider whether that indicates to you that he got them from some illegal source" (R. 49). The fact that the stamps were counterfeit could certainly be considered by the jury in appraising the lawfulness of petitioner's possession. It is, of course, true that counterfeit ration stamps could inadvertently be received. But it is manifest that the jury was entitled to conclude that no such situation existed in this case. See pp. 7–9, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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